

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the
Revocation of the
Family Day Care
License of Faye Lee

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 10:00 a.m. on Tuesday, September 20, 1988, at the Douglas County Courthouse, Alexandria, Minnesota. The record on this matter was closed at the conclusion of the hearing.

Faye M. Lee, 319 Fingal Drive, Alexandria, Minnesota 56308, appeared and testified on her own behalf. F. Michael Marxen, Director of Douglas County Social Services, Courthouse, 305 Eighth Avenue West, Alexandria, Minnesota 56308, appeared on behalf of the Douglas County Social Services Department (County).

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of the Minnesota Department of Human Services shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Sandra Gardebring, Department of Human Services, Second Floor, Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155-3815.

STATEMENT OF ISSUE

The purpose of this proceeding is to determine whether Ms. Lee is in compliance with Minn. Rule 9502.0335, subp. 6E. and F., and if not, whether her day care license should be revoked.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Faye Lee has been a licensed day care provider since mid-1985 and has cared for ten children in her home for the past three years. Those children range in age from approximately six months to seven or eight years old.

2. Ms. Lee has three sons who live in her home: Rick--age 15; Corey--age 13; and Zack--age 3.

3. On June 22, 1988, Douglas County Social Services received a report from the parent of a child who was in day care at the Lee home that the child,

Beth, age seven, said that Corey had touched her inappropriately. This report was communicated to the Alexandria Police Department and both the County Social Service Department and Police Department commenced an investigation to determine if an incident of sexual abuse had occurred.

4. During the investigation, Beth stated that while she was at the Lee home, Corey had taken her into the basement to play in a fort he had constructed. While in the fort, Beth stated that Corey touched her in the genital area over her clothes. Corey was subsequently interviewed and denied any inappropriate touching. The Administrative Law Judge specifically finds that Corey did touch Beth in her genital area over her clothes on the day in question.

5. The County determined that the reported incident of sexual abuse had been substantiated and immediately suspended Ms. Lee's day care license pursuant to Minn. Rule 9502.0341, subp. 9. Ms. Lee appealed the suspension and this hearing resulted.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 245A.08. The Notice of Hearing issued by the County was proper in all respects and both the County and Department have complied with all substantive and procedural requirements of law and rule.

2. The County has sufficiently demonstrated that reasonable cause existed to suspend Ms. Lee's day care license. Consequently, pursuant to Minn. Stat. 245A.08, subd. 3, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that he/she is in full compliance with the rules at issue.

3. Minn. Rule 9502.0335, subp. 6, paragraphs E and F read as follows:

Subp. 6. Disqualification factors. An applicant or provider shall not be issued a license or the license shall be revoked, not renewed, or suspended if the applicant, provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:

E. Has had a conviction of, has admitted to, or there is substantial evidence indicating incest (as prohibited in Minnesota Statutes, section 609.365), or physical abuse, sexual abuse, or neglect (as those terms are defined in Minnesota Statutes, section 626.556).

F. Has had a conviction of, has admitted to, or there is a preponderance of the evidence indicating the commission of any crime listed in Minnesota Statutes, chapter 152 and

sections 609.18 to 609.21 or 609.221 to 609.378, 609.556 to 609.563, 609.66 to 609.675, 617.23 or 617.246, other than those listed in item D. Conviction, admission, or a preponderance of evidence indicating the commission of a same or similar crime in another state or national jurisdiction shall also be grounds for license denial, revocation, nonrenewal, or suspension.

The term "sexual abuse" is defined in Minn. Stat. 626.556, subd. 2(a) as follows:

(a) "Sexual abuse" means the subjection by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342, 609.343, 609.344, or 609.345. Sexual abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 to 609.324 or 617.246.

The relevant portion of Minn. Stat. sec. 609.343 reads:

609.343 CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE.

Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exist:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;

The term "sexual contact" is defined in Minn. Stat. 609.341, subd. 11(b) as:

(b) "Sexual contact, for the purposes of sections 609.343, subdivision 1, clauses (g) and (h), and 609.345, subdivision 1, clauses (f) and (g), includes any of the following acts, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual or aggressive impulses:

- (i) the intentional touching by the actor of the complainant's intimate parts;
- (ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts;
- (iii) the touching by another of the complainant's intimate parts; or
- (iv) in any of the cases listed above, touching of the clothing covering the immediate area of

the intimate parts.

4. The Judge concludes that "sexual abuse" did not occur herein as that term is defined above.

5. The Judge concludes that the County has proved by a preponderance of the evidence that Ms. Lee's son, Corey, committed an act of criminal sexual conduct in the second degree.

6. The Judge concludes that a conditional indefinite suspension, rather than license revocation, is the appropriate remedy in this case.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Order of license revocation not be affirmed. Rather, that an Order be issued which indefinitely suspends Ms. Lee's family day care license; that the Order contain certain conditions, which if met, would qualify Ms. Lee for license reinstatement.

Dated this 29th day of September, 1988.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

The County asserts in its pleadings that sexual abuse occurred in Ms. Lee's home which is the basis for the license suspension. An act of "sexual abuse", however, is statutorily limited to a person responsible for the child's care, or by a person in a position of authority" The record in this matter does not show that Ms. Lee's son, Corey, was either a person responsible for Beth's care or a person in a position of authority. Consequently, the Judge has concluded that no acts of "sexual abuse" were committed herein.

The Judge has concluded that the County has shown, by a preponderance of the evidence, that Corey committed an act of criminal sexual conduct in the second degree.¹ This conclusion results in a violation of Minn. Rule 9502.0335, subp. 6F. and is grounds for license revocation or suspension.

The

Judge has recommended indefinite suspension, rather than revocation, for the following reasons. First, there is no past history of any "problems" with Ms.

Lee's son, Corey. If Corey could be examined by a "neutral" professional and it is determined that he poses no further risk to day care children, perhaps with additional counseling and therapy, license reinstatement would be appropriate. Second, because Corey is in school on school days, and is not in

the home with access to day care children, some provision could be made to guarantee that there would be no unsupervised access to the children by Corey. If this could be done, license reinstatement would be appropriate. The Judge further points out that there is no evidence of violence or a forced

act of sexual contact. Corey is only 13 years old, did not testify at the hearing, and the Judge has some difficulty in determining that criminal conduct has been committed with no knowledge of Corey's state of mind. For these reasons, a conditional indefinite suspension is the most appropriate remedy.

P.C.E.

¹The Judge points out that Minn. Stat. 245A.08, subd. 3 specifically shifts the burden of proof so a licensee must demonstrate compliance with the rules by a preponderance of the evidence. However, Minn. Rule 9502.0335, subp. 6F. requires that the County show by a preponderance of the evidence that any of the crimes listed have been committed. The Judge is unable to read both of these provisions together without unresolvable conflict.

